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8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
10

11 AT&T CORP.,

12 Plaintiff,

13 v.

14 DATAWAY INC. dba DATAWAY
DESIGNS,

15 Defendants.
16

) Case No. C07-02440 EDL

) REPLY IN SUPPORT OF MOTION OF
) PLAINTIFF AND COUNTER-
) DEFENDANT AT&T CORP. FOR
) ORDER AWARDING REASONABLE
) ATTORNEY'S FEES AND OTHER
) RELATED NONTAXABLE EXPENSES
) AS ITEMS OF COSTS OF SUIT

) [F.R.C.P., Rule 54(d)]

17 DATE: September 23, 2008
18 TIME: 9:00 a.m.
CTRM: E, 15th Floor

19
20 Plaintiff and Counterdefendant AT&T Corp., by and through its counsel of record,
21 hereby submits its reply in support of its motion for order awarding Plaintiff and
22 Counterdefendant AT&T Corp. attorney's fees (\$87,400.00) and other nontaxable related
23 expenses (\$2,062.40) totaling \$89,462.40 as items of costs of suit, as follows:

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REPLY MEMORANDUM

1. DISCUSSION

(A) THIS TARIFF IS NOT UNCONSCIONABLE; ATTORNEY'S FEE PROVISIONS ARE ROUTINELY ENFORCED BY THE COURTS OF THE UNITED STATES.

The "American Rule" (attorney fees ordinarily are not taxable as costs against the losing party) gives way when a party has sued under a contract that includes a valid agreement for a fee award to the prevailing party. [*First Nationwide Bank v. Summer House Joint Venture* (5th Cir. 1990) 902 F.2d 1197, 1199; *Linc Finance Corp. v. Onwuteaka* (7th Cir. 1997) 129 F.3d 917, 924; *Crowley American Transport, Inc. v. Richard Sewing Mach. Co.* (11th Cir. 1999) 172 F.3d 781, 785.] The "American Rule" also gives way when the fee award is made pursuant to a statute or rule providing for the shifting of fees to the losing party. [See *United States v. Standard Oil Co. of Calif.* (9th Cir. 1979) 603 F.2d 100, 103.]

A filed tariff binds both the carrier and the customer with the force of law. [*Lowden v. Simonds-Shields Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); see also *AT & T Corp. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996) (Stating that filed tariffs attain "the force of law and are not simply contractual").]

AT&T Tariff F.C.C. No. 30, Section 3.5.14 provides as follows: "In the event that the Company incurs fees or expenses, including attorney's fees, in collecting or attempting to collect any charges owed to the Company, the customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred."

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1 Such attorney's fees provisions are routinely contained in contracts, both in the
 2 commercial and consumer arenas, and are routinely enforced by the Courts of the United
 3 States. Here, no evidentiary showing has been made which would support a finding of
 4 unconscionability^{1/} on this record. No declaration or other evidence accompanies the
 5 opposition. The bear averments of defense counsel are of no consequence.

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 7 It cannot go un-noticed that in its answer to the complaint (Docket No. 31), Dataway
 8 Inc. prayed "[t]hat Defendant be awarded actual attorney's fees incurred herein." (Answer
 9 to Complaint, Docket No. 31, p. 13:18.) Further, the prayer for relief to the counterclaim
 10 (Docket No. 31) filed by Dataway Inc. prayed for an "award[of] costs, attorney's fees and
 11 expenses in prosecuting this action. (Counterclaim, Docket No. 31, p. 21:10-11.) As a
 12 result, Dataway Inc. can claim no surprise that the losing party in this litigation bore the risk
 13 of paying the prevailing party's attorney's fees and costs.

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 15 (B) THE NUMBER OF HOURS AND THE HOURLY RATE ARE ENTIRELY
 16 REASONABLE.

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 18 To quote opposing counsel:

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 20 "Despite its seemingly simplistic nature, it is respectfully
 21 submitted that this case presents novel issues the resolution of
 22 which will establish new precedent on the horizon of the legal

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 25 ^{1/}As noted in U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal.App.3d 1431:
 26 "Unconscionability involves both procedural and substantive aspects. ... The procedural
 27 element focuses on the "oppression" arising from an inequality of bargaining power
 28 between the parties and the "surprise" of a clause hidden in a printed document. ... The
 substantive element is concerned with whether the terms are overly harsh or one-sided.
 ..." (U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal.App.3d 1431, 1448.)

1 landscape created by the rapidly changing technology of our
2 world.”

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4 *[Dataway’s Memorandum of Points and Authorities in Support of Motion to Compel, Docket*
5 *No. 90-2, p. 2:12-15.]*

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7 The docket reflects no less than 140 items. The pleadings were challenged. Written
8 discovery was exchanged. Depositions were taken. Discovery law and motion practice was
9 required. A motion for summary judgment dealing with novel issues of law was litigated.
10 In short, this litigation was hotly contested.

11
12 AT&T Corp. prevailed on both the complaint and counterclaim – Its victory was
13 complete and unambiguous.^{2/}

14
15 Defense counsel attempts to make hay out of the settlement offers exchanged in this
16 action, acknowledging that “Plaintiff [AT&T Corp.] offered a “walk away” resolution, that
17 is, each party would dismiss its claims against the other and pay its own costs and fees.” In
18 truth and in fact, AT&T Corp. did offer the “walk away” proposal beginning in November
19 of 2007. The “walk away” proposal bore no relation to AT&T Corp.’s subjective belief
20 regarding the merits of its case, but rather was reflective of its desire to avoid the nuisance
21 of the counterclaim and the potential far reaching impact of an adverse outcome – no matter
22 how remote. All the expense in this action was incurred after that “walk away” offer was
23 initially made and there never was any merit to Dataway Inc.’s position. Dataway Inc.
24 refused to accept this reasonable and rational proposal, thereby forcing AT&T Corp. to
25 defend against the counterclaim at no small expense. Indeed, the reason why this litigation

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27 ^{2/}The degree of a party's overall success goes to the reasonableness of a fee award.
28 *[Hensley v. Eckerhart (1983) 461 U.S. 424, 436; Farrar v. Hobby (1992) 506 U.S. 103,*
114.]

1 dragged on and consumed the valuable resources of the parties and this Court is because
2 Dataway Inc. simply refused to acknowledge the controlling legal authority as well as basic
3 concepts of risk minimization through settlement.^{3/} Moreover, Dataway Inc.'s press of the
4 issues in this case required AT&T to protect its legal position in similarly situated litigation
5 involving Title 47. An adverse outcome in this case might have more far reaching effect
6 beyond Dataway Inc. Hence, inasmuch as Dataway Inc. refused to "walk away", AT&T
7 could spare no expense to have the issues presented in this action fully and fairly litigated.^{4/}
8

9 AT&T Corp. submitted a detailed declaration showing the hourly fee requested is
10 consistently in proportion to the value of the services performed by its attorney; that the level
11 of his sophistication has steadily increased with his age and experience; that he deals with
12 novel and difficult legal questions and has increasingly acquired the skill requisite to perform
13 legal services properly; that he generally works on a contingent fee basis and rarely accepts
14 hourly engagements since acceptance of matters at an hourly rate precludes him from
15 accepting other employment on a more lucrative contingency fee basis; that he deals with
16 large amounts in controversy, thereby exposing himself to greater malpractice risk given the
17 litigious climate in California; and that his experience, reputation, and ability have continued
18 to improve over the course of his legal career. AT&T Corp.'s attorney has been licensed to
19 practice law in the State of California since 1988. He have never been subject to disciplinary
20 action. Since 1989, his practice area has been trustee and creditor representation in
21

22 ^{3/}Substantial settlement offers should be considered by the district court as a factor in
23 determining reasonableness of an attorney fee award. [*Moriarty v. Svec* (7th Cir. 2000)
24 233 F.3d 955, 967 (District court should have considered settlement offer when it
awarded attorney fees.).]

25 ^{4/}Dataway Inc. appears to be seeking indirect compensation for the "damages" it claimed
26 in its counterclaim by suggesting that AT&T Corp.'s fee award should be reduced since
27 Dataway Inc. has already incurred \$115,000 in "costs" relating to this action. The
28 argument ignores the reality that Dataway Inc.'s "costs" were the direct result of its
decision to litigate a losing case. All of this could have been avoided had Dataway Inc.
accepted AT&T Corp.'s "walk away" proposal back in November of 2007.

1 bankruptcy matters, as well as commercial collection, asset recovery and enforcement of
 2 judgments. He has authored published articles on these topics. He has also lectured on these
 3 topics for the Continuing Education of the Bar, the Orange County Bar Association, and
 4 Chapman University School of Law. His reported decisions include Mannaa v. Zahabi
 5 (2008) ___ Cal.App.4th ___, In re Turner (N.D. Cal. Bkrptcy 2006) 335 B.R. 140, Turner
 6 v. Cook (9th Cir. 2004) 362 F.3d 1219, Annod v. Hamilton & Samuels (2002) 100
 7 Cal.App.4th 1286, and Anchor Marine Repair Co. v. Magnan (2001) 93 Cal.App.4th 525.
 8 In sum, AT&T Corp.'s attorney has an excellent reputation in the legal community and his
 9 skill level rivals the best litigators in the State. Defense counsel's suggestion that AT&T
 10 Corp.'s attorney does not merit the hourly fee he commands is devoid of any evidentiary
 11 support and, therefore, must be disregarded. \$400 per hour^{5/} is reasonable for a 20 year
 12 lawyer practicing out of Newport Beach, California.^{6/}

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 14 The reasonable value of the attorney's fees incurred in this action by AT&T Corp. is
 15 \$87,400.00. This amount should be fixed as reasonable attorney's fees as an item of costs
 16 of suit. Related nontaxable expenses totaling \$2,062.40 have been incurred. An order should
 17 be entered awarding Plaintiff and Counterdefendant AT&T Corp. attorney's fees
 18 (\$87,400.00) and other nontaxable related expenses (\$2,062.40) totaling \$89,462.40 as items
 19 of costs of suit.

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 22 ^{5/}"Those responding had practiced civil law an average of 38 years, with 31 percent
 23 representing defendants, 24 percent representing plaintiffs and 44 percent represented
 24 both plaintiffs and defendants in their practices. They represented civil attorneys with a
 25 median hourly rate of \$350, and a range of \$120 to \$1,000 per hour. More than half
 26 litigate in state court primarily, while 18 percent litigate primarily in federal court, and the
 27 rest have practices equally divided between the two." [*MacLean, The National Law*
 28 *Journal*, "Cost of Discovery a Driving Force in Settling Cases, Study Shows",
(September 10, 2008).]

^{6/}AT&T Corp. is free to select any licensed attorney in California to protect its interests,
 wherever located.

2. CONCLUSION

For the foregoing reasons, as well as those stated in the moving papers, this Court should enter an order awarding Plaintiff and Counterdefendant AT&T Corp. attorney's fees (\$87,400.00) and other nontaxable related expenses (\$2,062.40) totaling \$89,462.40 as items of costs of suit.

DATED: September 16, 2008 AIRES LAW FIRM

By: 

Timothy Carl Aires, Esq.
Attorney for Plaintiff and Counterdefendant,
AT&T CORP.